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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Yuba)

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THE PEOPLE,

Plaintiff and Respondent,

v.

ANDY HAROLD ALLAN,

Defendant and Appellant.

C075275

(Super. Ct. No. CRF00505)

In August 2001, defendant Andy Harold Allan pled guilty to a charge of being a felon in possession of a firearm (former Pen. Code, § 12021, subd. (a)(1))<sup>1</sup> and admitted two strike allegations. The trial court sentenced him to serve 25 years to life in prison. In

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

Former section 12021 was part of a legislative reorganization and reenactment without substantive change, operative January 1, 2012. (Stats. 2010, ch. 711, §§ 4, 6.) Former section 12021 is now section 29800. (Stats. 2010, ch. 711, § 6.) In this opinion, we use the former numbering of this section, which is used throughout the record and in the abstract of judgment.

August 2013, defendant filed a petition for resentencing pursuant to section 1170.126. The trial court denied the petition after a contested hearing, finding defendant was ineligible for resentencing.

On appeal, defendant contends (1) the trial court could not find defendant was armed with a firearm because that fact was not pled and proven, and (2) the armed with a firearm exclusion does not apply to felon in possession of a firearm. Based on the sound reasoning of prior opinions, we reject both contentions and affirm the judgment.

### BACKGROUND

Since defendant pled guilty, the facts of defendant's crime are taken from the probation report for the original prosecution of the case.

On September 3, 2000, at about 6:37 p.m., Yuba County deputy sheriffs responded to a report that defendant was at a location armed with two handguns. Talking to crisis negotiators, defendant admitted having both a .25-caliber and .45-caliber handgun. At about 2:15 a.m. on September 4, defendant told negotiators he was placing the guns in a microwave oven and then exiting the residence. Officers found a .25-caliber handgun and a .45-caliber handgun in the microwave after defendant left the residence and was arrested. Defendant had numerous prior felony convictions, including a conviction for robbery and two convictions for attempted robbery.

At the hearing on defendant's resentencing petition, the trial court found defendant was ineligible for resentencing because he was armed in the commission of his current offense.

## DISCUSSION

### I

#### *Pleading and Proof Requirement*

Defendant contends he could not be found ineligible for resentencing under section 1170.126 because it was not pled and proven that he was armed with a firearm in the commission of his crime.

Section 1170.126 allows defendants serving a life term for a third strike to petition for resentencing. (§ 1170.126, subd. (b).) Eligibility for resentencing is initially limited to defendants serving life terms for felonies that are neither serious nor violent. (§ 1170.126, subd. (e)(1).) Other factors can render a defendant ineligible for resentencing. One of the disqualifying factors, as cross-referenced in section 1170.126, subdivision (e)(2), renders an offense ineligible for recall of sentence if “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§ 667, subd. (e)(2)(C)(iii).)

Defendant argues this provision must be read with the changes to the three strikes law enacted with section 1170.126 as part of Proposition 36, the Three Strikes Reform Act of 2012 (§§ 667, 1170.12, 1170.126; Prop. 36, as approved by voters, Gen. Elec. (Nov. 6, 2012) (the Act)). Following Proposition 36, a defendant generally is not subject to a three strikes sentence if the current offense is not a serious or violent felony. (§§ 667, subd. (e)(2)(C), 1170.12, subd. (c)(2)(C).) However, a defendant is eligible for a three strikes sentence when the current offense is not serious or violent if the prosecution “pleads and proves” that “[d]uring the commission of the current offense, the defendant used a firearm, was armed with a firearm or deadly weapon, or intended to cause great bodily injury to another person.” (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii).)

According to defendant, the pleading and proof requirement of these provisions must also apply to the armed with a firearm exception for eligibility for resentencing under section 1170.126. His interpretation is based on the principles of statutory construction that statutory language must be interpreted in the context of the enactment as a whole (*Citizens Assn. of Sunset Beach v. Orange County Local Formation Com.* (2012) 209 Cal.App.4th 1182, 1189), that courts should construe ambiguities in penal statutes to avoid constitutional problems (*People v. Leiva* (2013) 56 Cal.4th 498, 506-507), remedial statutes should be liberally construed (*Estate of Stoker* (2011) 193 Cal.App.4th 236, 242), and the rule of lenity (*In re M.M.* (2012) 54 Cal.4th 530, 545).

Defendant's interpretation of Proposition 36 has been rejected by a panel of this court (*People v. Elder* (2014) 227 Cal.App.4th 1308, 1311) as well as every other Court of Appeal to consider whether there is a pleading and proof requirement that a defendant engaged in the conduct that rendered him or her ineligible for resentencing. (See *People v. Osuna* (2014) 225 Cal.App.4th 1020, 1033; *People v. Blakely* (2014) 225 Cal.App.4th 1042, 1058; *People v. White* (2014) 223 Cal.App.4th 512, 526-527.) These cases held that the omission of a pleading and proof requirement in section 1170.126 was determinative, rendering superfluous any other principles of statutory construction. (See *Elder*, at pp. 1314-1315.) We agree. Thus, there is no requirement the arming factor must be pled and proven before being considered by the trial court to determine that defendant is ineligible for resentencing under section 1170.126.

## II

### ***Armed During Possession of a Firearm***

Defendant also contends the trial court erred in excluding him from resentencing because exclusion is mandated "only where there is a separate, 'tethering' felony in which the defendant is armed with a firearm." Relying on cases addressing the

application of firearm enhancements, defendant argues this “tethering” crime cannot be a weapon possession offense.

This contention has been rejected by this court as well as another Court of Appeal. (*People v. Elder, supra*, 227 Cal.App.4th at pp. 1312-1314; *People v. Osuna, supra*, 225 Cal.App.4th at p. 1032.) Further, two appellate decisions have held a charge of felon in possession of a firearm is subject to exclusion from section 1170.126 resentencing when the defendant was armed during the offense. (*People v. Blakely, supra*, 225 Cal.App.4th at p. 1054; *People v. White, supra*, 223 Cal.App.4th at p. 524.)

Defendant’s contention is based on section 12022, which provides an enhancement for being armed with a firearm “in the commission or attempted commission of the underlying felony.” (§ 12022, subd. (a)(1).) This argument was rejected in *People v. Osuna, supra*, 225 Cal.App.4th 1020 based on the differences in statutory language and the purpose of the two statutory schemes. As explained by the *Osuna* court, the “defendant was armed with a firearm *during* his possession of the gun, but not ‘in the commission’ of his crime of possession. There was no facilitative nexus; his having the firearm available for use did not further his illegal possession of it. There was, however, a temporal nexus. Since the Act uses the phrase ‘[d]uring the commission of the current offense,’ and not in the commission of the current offense (§§ 667, subd. (e)(2)(C)(iii), 1170.12, subd. (c)(2)(C)(iii)), and since at issue is not the imposition of additional punishment but rather eligibility for reduced punishment, we conclude the literal language of the Act disqualifies an inmate from resentencing if he or she was armed with a firearm during the unlawful possession of that firearm.” (*People v. Osuna, supra*, 225 Cal.App.4th at p. 1032.)

Here, the record shows defendant in fact held the firearms when he committed the offense during the standoff with law enforcement. Thus, the trial court correctly excluded defendant from section 1170.126 resentencing.

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

ROBIE, Acting P. J.

DUARTE, J.